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LAW ENFORCEMENT AND OTHER OFFICERS

N.Y. CONST. art. XIII, § 13(a):

Except in counties in the city of New York and except as authorized in section one of article nine of this constitution, registers in counties having registers shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require; the sheriff and the clerk of each county shall be chosen by the electors once in every three or four years as the legislature shall direct. Sheriffs shall hold on other office. They may be required by law to renew security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. [But the county shall never be made responsible for the acts of the sheriff].

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

Blass v. Cuomo⁶²⁶
(decided May 28, 1991)

Nine members of the Suffolk County Legislature brought this action against Governor Mario Cuomo and William G. Holst asserting that the power to fill a vacancy in the office of County Clerk of Suffolk County is vested in the Suffolk County Executive and the Suffolk County Legislature pursuant to Suffolk County Charter C18-3(2).⁶²⁷ Governor Cuomo, however, claimed that this power resides in the Governor by way of New

626. 168 A.D.2d 54, 570 N.Y.S.2d 326 (2d Dep't), *appeal dismissed*, 78 N.Y.2d 1121, 586 N.E.2d 57, 578 N.Y.S.2d 874 (1991).

627. *Id.* at 56, 570 N.Y.S.2d at 327. Section C18-3 of the Suffolk County Code entitled "Filling vacancies" provides that "the vacancy shall be filled by appointment of a qualified person by the County Executive with the approval of the County Legislature." SUFFOLK COUNTY CODE § C18-3(B) (1991).

York State's County Law, section 400(7).⁶²⁸ The court held that because the office of County Clerk is a quasi-state office,⁶²⁹ the governor has the power to fill its vacancy. This authority takes precedence over the power of the Suffolk County Executive.⁶³⁰

In 1985, Suffolk County amended its charter by Local Laws 1985, No. 12, which added a provision that gave the county executive, with the approval of the legislature, the power to appoint the county clerk.

The former Suffolk County Clerk died on May 5, 1989 with over one year and a half left to her term. Soon after, on May 28, 1989, Governor Cuomo appointed William G. Holst as County Clerk to fill the vacancy until December 31, 1989. Three days later, on May 31, 1989, plaintiffs commenced this action seeking a judgment enjoining Holst from performing the functions and duties of Suffolk County Clerk. They also sought a judgment declaring that:

- (1) [T]he power to fill a vacancy in the office of County Clerk of Suffolk County is vested in the Suffolk County Executive and Legislature pursuant to Suffolk County Charter § C18-3(2), (2) the Governor was without power or authority to fill the vacancy, (3) the Governor's purported appointment of Holst was illegal, null and void, and (4) the person to be elected at the general election, which was to be held on November 7, 1989, should serve for the unexpired portion of the deceased former County Clerk's term after November 7, 1989.⁶³¹

A new clerk was elected on November 7, 1989.⁶³² The court explained that it decided this issue, although rendered moot by the election of a county clerk, "'because of the substantial importance and recurring nature of the issue presented.'"⁶³³

628. N.Y. COUNTY LAW § 400(7) (McKinney 1991) ("a vacancy in an elective county office, shall be filled by the governor by appointment . . .").

629. *Blass*, 168 A.D.2d at 57, 570 N.Y.S.2d at 328.

630. *See id.* at 58, 570 N.Y.S.2d at 329.

631. *Id.* at 56, 570 N.Y.S.2d at 327.

632. *See id.* at 56, 58, 570 N.Y.S.2d at 327, 328.

633. *Id.* at 58, 570 N.Y.S.2d at 328-29 (quoting *Carey v. Oswego County Legislature*, 59 N.Y.2d 847, 849, 458 N.E.2d 541, 541, 466 N.Y.S.2d 312, 312 (1983)).

The court began its analysis with article XIII, section 13(a) of the New York State Constitution that provides that the county clerk is to be chosen by the electors once every three or four years.⁶³⁴ It then referred to the home rule provision⁶³⁵ which provided that officers of local government, whose election or appointment is not provided for by the constitution, are to be elected or appointed by the officers of the local government according to local law. Although this power is limited by article IX, section (2)(c),⁶³⁶ that limitation was not applicable in this case.

The court then examined the relevant state law,⁶³⁷ which provided that the governor fill all vacancies in elective county offices, and concluded that “the home rule provisions of Article IX [of the New York State Constitution] do not operate to restrict the [State] Legislature in acting on matters of State concern.”⁶³⁸

The court relied on the recent decision of *National Westminster Bank, USA v. New York*⁶³⁹ in determining that state law rather than local law would control in this case. In *National Westminster*, the court of appeals held the State of New York liable for damages for the negligence of the Bronx County

634. *Id.* at 56, 570 N.Y.S.2d at 327; see N.Y. CONST. art. XIII, § 13(a) (“the clerk of each county shall be chosen by the electors once in every three or four years as the legislature shall direct”).

635. N.Y. CONST. art. IX, § 1(b). (“All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.”).

636. See N.Y. CONST. art. IX, § 2(c)(ii) (every local government “shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects . . . (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees . . .”). *Id.*

637. N.Y. COUNTY LAW § 400(7) (McKinney 1991).

638. *Blass*, 168 A.D.2d at 57, 570 N.Y.S.2d at 328 (quoting *Kelley v. McGee*, 57 N.Y.2d 522, 538, 443 N.E.2d 908, 913, 457 N.Y.S.2d 434, 439 (1982)).

639. 76 N.Y.2d 507, 562 N.E.2d 866, 561 N.Y.S.2d 541 (1990).

Clerk.⁶⁴⁰ In doing so, the court acknowledged that the county clerk performs both state and local functions and determined that the state is not liable for the local functions.⁶⁴¹ The court found that the office of county clerk is a quasi-state office, and therefore, the home rule provision, which allows local law to provide for election or appointment of officers of local government, does not apply.

THIRD DEPARTMENT

*Thoubboron v. New York State Department of Civil Service*⁶⁴²
(decided July 18, 1991)

The plaintiffs, Albany County sheriffs, contended that the New York State Department of Civil Services (NYSDCS) and the Civil Service Commission (CSC) misinterpreted recently amended article XIII, section 13(a) of the New York State Constitution⁶⁴³ by issuing a memorandum stating that appointees of sheriffs were now brought into the classified civil service system.⁶⁴⁴ The court held that in light of the recent amendment abolishing exclusive personal liability of sheriffs for their appointees' acts or omissions, such appointees were no longer excluded from application of civil service procedures.⁶⁴⁵

The NYSDCS issued a memorandum to all civil service agencies stating that the effect of the amendment was to abolish the exclusion of sheriffs' appointees from application of civil service procedures as had previously been the case.⁶⁴⁶ Moreover, the memorandum stated that the amendment had the effect of overruling the 1908 New York Court of Appeals decision of *Flaherty v. Milliken*.⁶⁴⁷

The court held that article XIII, section 13(a) brought

640. *Id.* at 509-10, 562 N.E.2d at 867-68, 561 N.Y.S.2d at 542-43.

641. *Id.* at 509, 562 N.E.2d at 868, 561 N.Y.S.2d at 543.

642. 572 N.Y.S.2d 494 (3d Dep't 1991).

643. N.Y. CONST. art. XIII, § 13(a).

644. *Thoubboron*, 572 N.Y.S.2d at 494.

645. *Id.* at 495.

646. *Id.* at 494.

647. 193 N.Y. 564, 86 N.E. 558 (1908).